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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

MARY ALICE FIRESTONE,
Petitioner,

vs.

TIME, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, MARY ALICE FIRESTONE, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1972.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has as yet not been reported and is printed herein as an Appendix.

PREFACE

For the Court's convenience, the Appendix filed by the Respondent in the United States Court of Appeals for the Fifth Circuit has been certified to this Court as part

of the record. Various references will be made to the Appendix in lieu of the more bulky trial transcripts or original pleadings. An Appendix containing the opinion and judgment of the United States Court of Appeals for the Fifth Circuit is attached to this Petition. The following symbols will be used as references:

"A" Three volume Appendix certified to this Court from the United States Court of Appeals for the Fifth Circuit.

"AP" Appendix attached to Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 20, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 19 1(b).

QUESTIONS PRESENTED

I

WHEN DOES A STATEMENT DEPART FROM THE BOUNDARIES OF FACTUAL REPORTING OF MATTERS OF PUBLIC INTEREST AND BECOME A PURELY PRIVATE LIBEL?

II

IN REVIEWING A FINAL JUDGMENT AWARDING DAMAGES IN A LIBEL ACTION BROUGHT BY A PRIVATE CITIZEN, TO WHAT EXTENT MAY A UNITED STATES COURT OF APPEALS MAKE A *"DE NOVO"* "INDEPENDENT CONSTITUTIONAL JUDGMENT"?

III

BY WHAT BURDEN MUST A PLAINTIFF IN A LIBEL ACTION INVOLVING FIRST AMENDMENT PRIVILEGES PROVE THE FALSITY OF THE PUBLISHED STATEMENT—MUST THE PLAINTIFF PROVE THE FALSITY OF THE STATEMENT BY A PREPONDERANCE OF THE EVIDENCE OR BY "CLEAR AND CONVINCING PROOF GREATER THAN A PREPONDERANCE"?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, SECTION 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Florida without a jury by stipulation of counsel. The jurisdiction of the District Court was invoked under the diversity of citizenship provisions of 28 U.S.C. §1332.

In Petitioner's Amended Complaint, she contended that an article published and distributed by the Respondent in its magazine, Life, was both false and malicious. Further, that as a result of Respondent's action and conduct, Petitioner suffered damages in the following respects: (1) She was severely injured in her "personal relations" and reputation in the community so as to subject her to distress, contempt, ridicule and humiliation. (2) The article falsely implied that she was guilty of bribery and was "inciting to commit perjury". (3) She was injured in her then pending private marital litigation. Petitioner also sought punitive damages from the Respondent. (A-2-7)

While the overall article ostensibly dealt with the general subject of eavesdropping and wiretapping, a particular portion of the article was devoted entirely to the Petitioner, her pending marital difficulties and the invasions of her privacy and embarrassment to which she had recently been subjected. Additionally, the article stated that the Petitioner had been "spying" on her estranged husband. The article was captioned, "DIVORCE SPY", and read as follows:

> "TWO-WAY SNOOP. In Florida where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire

man', was hired by tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and says Harwood, 'He plays just as rough with the bugs as I do'. A court recently ordered Russell and Mary Alice (right) to stop spying on each other." (A-9)

Subsequent to the filing of the Petitioner's Amended Complaint, the District Court, Judge Atkins, presiding, dismissed that Amended Complaint for failure to state a cause of action. On appeal, the United States Court of Appeals for the Fifth Circuit held that the complaint as amended adequately stated a cause of action for libel per se and libel per quod and remanded the case to the District Court. *Firestone* v. *Time, Inc.*, 414 F.2d 790 (5th Cir. 1969)

The Respondent then moved the District Court for the entry of a summary judgment in its favor. On December 2, 1969, the Trial Court entered its order denying the Respondent's Motion for Summary Judgment, holding that:

"The Court is of the opinion that the Plaintiff is not a 'public figure' under these authorities. And, while the general subject of eavesdropping may be considered a 'matter of great public concern', certainly the Plaintiff's private marital difficulties, as referred to in the article are not of that character. Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the personal reference.

The law in this area is not stretched so far as to allow the publisher to create its own defense to possible litigation." (A-16, 17)

The order further stated that even if the Petitioner's Amended Complaint was subject to the constitutional defense under the doctrine laid down in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the affidavits submitted by the Court clearly presented issues of fact to be presented to a trier of fact. (A-17-19)

In its order, the Court allowed the Respondent to make application to the Circuit Court of Appeals for the Fifth Circuit for review of the order and the Respondent availed itself of that opportunity. On the 29th of January, 1970, the Court of Appeals denied the Respondent's application for review of the aforesaid order of the District Court and also denied a re-hearing on application on March 24, 1970. The Respondent then filed its Petition for Certiorari to this Court and certiorari was denied on June 1, 1970, 398 U.S. 940 (1970).

This case proceeded to trial commencing on August 17, 1970, and on February 10, 1971, the Honorable Judge Emett C. Choate entered the Court's findings of fact and conclusions of law. (A-927-938)

The evidence at trial disclosed that prior to the publication of the article in question, the Respondent never requested or received any permission for its publication. (A-45, 46, 284, 815) David Chandler, a stringer, that is a reporter who worked on a commission or hourly basis for the Respondent, was the person in the large Time, Inc. organization who was the actual creator of the article although Richard Billings, another Life employee, did the actual writing of the article. (A-91) Richard Billings relied totally on information provided by David Chandler

in writing the article. (A-256, 263, 274, 279-281) At no time was any effort made to verify any statements made by Chandler and the article was published substantially as submitted by him. (A-92)

David Chandler was hired by Richard Billings to act as a stringer for Life without any investigation of Chandler's background or reputation for truth and veracity. The evidence at trial disclosed that David Chandler's reputation among persons who had known him for truth and veracity was disgraceful. (A-145, 151, 152, 268, 269, 408, 409, 613, 616)

Chandler's reporting duties led him to John Harwood (who was pictured above the Petitioner and her husband in the article). At trial, Harwood denied making any statements to Chandler which could have furnished any basis for the subsequent article. While Harwood did state that he may have mentioned to Chandler an opinion concerning whether Carl Geisler, the employee referred to in the article, had gone to work for the Petitioner, he testified that he made it clear to Chandler that his only source of such information was *an anonymous phone call in the middle of the night* and he had no basis on which to verify this belief. (A-472, 487) Chandler further knew that John Harwood had continued to employ Carl Geisler for at least four months subsequent to these phone calls and that when Carl Geisler was discharged, it was not on the basis of these anonymous calls. (A-505) Furthermore, Chandler knew and conveyed the fact to the Life Magazine staff that Harwood had "developed a paranoid hatred" of the Petitioner. (A-73) As stated by Judge Bell of the Court of Appeals in his specially concurring opinion:

> "There was much to put Life on notice to move cautiously. A description of Harwood's work style was

> revolting to the point that one might question his credibility. In addition, Chandler drew the conclusion that Harwood had 'developed a paranoid hatred' of Mrs. Firestone. Life made no check with anyone other than Chandler before publishing this statement." (AP-A21-A22)

The Petitioner testified at trial that at an interview with Chandler, she was requested by him to engage in sexual intercourse in exchange for his "being kind" in his article. When she refused, he told her she would be sorry. (A-174, 175)

On February 23, 1971, the District Court entered its Judgment On Findings Of Court For Plaintiff, awarding the Petitioner $15,000.00 compensatory damages and $15,000.00 exemplary damages against the Respondent. (A-939, 940) After the entry of the Judgment, Time, Inc. filed its Notice of Appeal. (A-940, 941)

On April 20, 1972, the United States Court of Appeals for the Fifth Circuit reversed the Final Judgment of the United States District Court for the Southern District of Florida. The Court was unable to arrive at a majority opinion. Judge Ainsworth reversed the Final Judgment in favor of the Petitioner on the basis of his "own independent *de novo* review of this case" (AP-A17) in which he determined that there was no showing of reckless or malicious conduct on the part of the Respondent. Judge Bell specially concurred in the reversal of the Final Judgment but disagreed with Judge Ainsworth that the United States Constitution sanctioned a *de novo* review of the record. (AP-A22, A23, A24) His opinion was based, however, on the fact that there was no clear and convincing evidence that the statement published by the Respondent was false. (AP-A22) Judge Godbold also specifically con-

curred in the reversal of the Final Judgment, but he also rejected the "independent de novo" standard of review enunciated in Judge Ainsworth's opinion. He concluded, however, that the statement published by the Respondent did involve "an issue of public or general concern" as enunciated by this Court in *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 44, 45 (1971) and concluded that the record failed to provide substantial evidence of reckless or malicious conduct on the part of the Respondent. (AP-A24, A25)

It is from the three separate opinions rendered by the United States Court of Appeals for the Fifth Circuit that Mary Alice Firestone brings her Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The most recent case in which this Court has been called upon to interpret the extent of constitutional protection afforded to defamation of private citizens other than public figures was *Rosenbloom* v. *Metromedia*, supra. In that case, a three member plurality of the Court announced the opinion:

> "[T]hat the time has come forthrightly to announce that the determinate whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases." Id. at page 44.

As that case involved a radio publication clearly dealing with matters of public or general concern, there was no compelling reason for the Court to consider individual interests in privacy. Id. at page 48. The Court was therefore not called upon to determine which areas of a private individual's life are his own and which areas are of "public interest" and thus protected by the constitu-

tional qualified privileges of *New York Times Co.* v. *Sullivan*, supra. The plurality opinion did, however, indicate that, "[S]ome aspects of the lives of even the most public men fall outside the area of matters of public or general concern." Id.

In the case sub judice, the primary issue is whether the Petitioner's private marital difficulties were of "public or general concern". Unlike *Metromedia*, the present task of determining and separating the Petitioner's interest in privacy and dignity from the public's right to be informed with regard to matters of general concern is not so easily accomplished. While the overall theme of the Life Magazine article may have been of public concern, that portion which defamed the Petitioner related solely to private aspects of her life. It is respectfully submitted that the facts of the instant case present for the Court's consideration an important question relating to First Amendment rights. This Court should accept jurisdiction of the cause in order to render a decision with regard to this Federal constitutional issue and "to provide guidelines or standards by which Courts are to decide the scope of public concern". Id. at page 79, Justice Marshall and Justice Stewart dissenting.

The facts of the instant case also present significant additional issues involving areas of tension between First Amendment rights and the rights of private citizens to protect their reputations. In *Rosenbloom* v. *Metromedia*, supra at page 54, the view was expressed that, "This Court has an 'obligation to test challenged judgments against the guarantees of First and Fourteenth Amendments', and in doing so 'this Court cannot avoid making an independent constitutional judgment of the facts of the case'". The interpretation of that phraseology by the Fifth Circuit Court of Appeals has been inconsistent, giving rise to

three separate opinions and it is respectfully submitted that this Honorable Court should accept jurisdiction of this cause and announce a rule of general application delineating the scope of appellate review in constitutionally protected libel cases. To do otherwise would undoubtedly lead a significant portion of the appellate courts of this nation to sanction a case by case scrutiny of trial verdicts causing instability and confusion in the interpretation of First Amendment rights throughout the nation.

Finally, the standards by which a plaintiff in a First Amendment case must prove falsity of the defendant's statement has never been expressed by this Court. While Judges Ainsworth and Bell, below, found the standard to be one of "clear and convincing proof", it is respectfully submitted that this is an unwarranted extension of the requirements enunciated in *New York Times Co.* v. *Sullivan,* supra. This Court should, therefore, accept jurisdiction of this cause and hold consistently with *New York Times* that the burden of proving falsity is a preponderance of the evidence. Only the element of recklessness or knowledge need be proved by "clear and convincing" proof. *Rosenbloom* v. *Metromedia,* supra at page 30, impliedly so holds.

I

When Does a Statement Depart from the Boundaries of Factual Reporting of Matters of Public Interest and Become a Purely Private Libel?

The plurality opinion of *Rosenbloom* v. *Metromedia,* supra, extended the constitutional protections of *New York Times Co.* v. *Sullivan* to all discussions and communications involving matters "of public or general concern, albeit leaving the delineation of the reach of that term to future cases". Id. at page 44. As was noted by

the dissent, while *Metromedia* itself required no differentiation between the private and the public aspects of a citizen's life, other cases undoubtedly would.

The plurality opinion of *Metromedia* formed the backbone of the Fifth Circuit Court of Appeals' decision to reverse the final judgment of the District Court. As expressed in the opinion of Judge Ainsworth:

> "Our review of this case is written with the principles of the recent decisions of the Supreme Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), squarely before us. In *Metromedia*, the Supreme Court reached a new dimension under the First Amendment constitutional protection for freedom of speech and of the press. No longer did the constitutional guarantee apply only to suits of public figures or public officials but in a sweeping decision the plurality opinion of the Court (by Justice Brennan) extended 'constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.' Id., 403 U.S. at 44, 91 S.Ct. at 1820. . . .
>
> "As now expressed by the Supreme Court in *Metromedia*, 403 U.S. at 44, 91 S.Ct. at 1820, 'It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official", "public figure", or "private individual", as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest.'" (AP-A7, A8-A9)

Judge Bell's concurring opinion also assumed *Metromedia* to have extended First Amendment protections to the instant case.

> "This rule reached its full scope in *Rosenbloom* v. *Metromedia*, 1971, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296, when it was extended to place the same burden on any citizen if the utterance involved is related to an issue of public or general concern. 403 U.S. at 44." (AP-A18)

Finally, while Judge Godbold also accepted the conclusion that Life's publication was "within the *Metromedia* phraseology", he expressed his concern for the lack of guidelines on which he based his decision and noted "that the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside of its scope". (AP-A24)

The gravamen of the Petitioner's action against the Respondent is that the article unreasonably intruded into and fabricated private aspects of her life causing severe damage to her personal relations and reputation in the community. (AP-A3, A4) The United States District Court for the Southern District of Florida, after examining the evidence placed before it, agreed with the Petitioner's contention that the article dealt solely with private aspects of her life.[1]

---

1. "9. The Court has previously ruled, on defendant's motion for summary judgment, that the article in so far as it related to plaintiff was not constitutionally protected under the New York Times doctrine. The Court adheres to that ruling. The plaintiff was not of that class of persons who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' Her private affairs were not a matter of legitimate public concern. The Court reiterates that the mere fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference.

On appeal from the Final Judgment, it was concluded as a result of the *Metromedia* decision that the Respondent's defamatory statement was within the First Amendment protections announced in *New York Times Co.* v. *Sullivan.* These First Amendment protections were found to extend to the Respondent's publication despite the fact that the Petitioner was "a hapless private citizen, involved in a divorce proceeding with attendant wire tapping activity at the behest of her husband and his private detective-minion". (AP-A20)

It is respectfully submitted that the Circuit Court of Appeals departed from acceptable judicial procedure in overruling the finder of facts' conclusion that the article dealt with an area of the Petitioner's life which she had a right to expect to remain excluded from public view. More importantly, in holding as a matter of law that the Petitioner's private marital matters were "of public or general concern", the Court of Appeals decided an important issue of First Amendment rights and, in fact, opened the floodgates to the argument that any private aspect of a citizen's life is a matter of legitimate public concern if published by a major news periodical. Yet, as this Court stated in *Metromedia,* "[S]ome aspects of the lives of even the most public man fall outside the area of matters of public or general concern". Id. at page 48.

"10. Since *Butts* Lower Courts have extended constitutional protection to publications concerning matters of public interest apart from the public figure concept. See *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858, 861 (5 Cir. 1970) in cases cited, note 4. However, this does not mean that every reference in such an article is automatically protected merely because the stated subject matter thereof concerns a matter of public interest. Thus, while the general subject of electronic eavesdropping might properly be considered a matter of public concern, the plaintiff's private marital difficulties as referred to in the article were not. The defendant concedes that the reference to plaintiff was merely 'illustrative', and it could have been deleted entirely without prejudice to the substance of the article." (A-931, 932)

The record of the trial proceedings was virtually void of evidence which would demonstrate the necessity of bringing the Petitioner's private life into the Life Magazine article. (A-932) Indeed, the testimony clearly showed that the Petitioner and her attorney were both led to believe that her private life would not be touched upon by the article. (A-174, 815, 820, 933) Even so, it is admitted that a determination of what areas of a private individual's life are his own and what areas are "of public interest", may often be a difficult task. See the dissenting opinions of Justices Harlan and Marshall in *Rosenbloom* v. *Metromedia, Inc.*, supra. Yet, for some time the appellate courts of this nation have been wrestling with that very issue in invasion of privacy actions and have been building "this infant area of the law . . . step by painful step". *Wagner* v. *Fawcett Publications*, 307 F.2d 409 (7th Cir. 1962), cert. denied 372 U.S. 909.

It has been held that the "touchstone is not whether the public is interested in plaintiff's views or conduct, for presumably that would apply to everything in the newspaper", *Afro-American Publishing Co.* v. *Jaffee*, 366 F.2d 649, 657 (D.C. Cir. 1966), and presumably "the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside its scope" (AP-A24), or create its own defense to litigation by referring to a particular individual in print. Yet, despite these obvious truisms the courts of this nation are nevertheless without standards by which they might distinguish between the public and private aspects of an individual's life. Judge Ainsworth, in his opinion, formulated the test of whether the particular portion of the article which related to the purely private aspects of an individual's life was "directly related to the central theme of the story". (AP-A9) Holding the private marital dif-

ficulties suffered by the Petitioner to be "germane to the article's principal theme and subject matter" (AP-A11), it was concluded that the Respondent was within the constitutional protections afforded by *New York Times Co.* v. *Sullivan.*

With the utmost respect for the opinion below, it is submitted that the tests formulated by Judge Ainsworth are erroneous and if allowed to stand will create chaos and instability, not only in the Fifth Circuit, but throughout the nation since the opinion below may provide precedent for similar decisions. There are few aspects of one's private life which could not, in some manner, be held "germane" to one public issue or another. Certainly the Petitioner's private marital difficulties were not, in their own right, occurrences of public or general interest. In order to bring a defamatory statement within the First Amendment protections, somewhat of a greater relationship between the statement and the public's interest in being informed must be demanded than was demanded by the Court of Appeals if individual reputations are to be safeguarded.

The Court's attention is called to 75 Yale L.J. 642, note, The Scope of First Amendment Protection for Good Faith Defamation Error (1966), cited by the Court at page 46 of the *Metromedia* opinion. While the note was published in 1966, its interpretation of First Amendment rights was well ahead of its time. That article called for an end to the "public official" and "public figure" doctrines and for an examination of the "public interest" aspects of each statement. The author went beyond what has been provided by *Metromedia,* however, to suggest guidelines for the determination of the public versus private aspects of an individual's life. At the same time, however, a reasonable degree of latitude was allowed for the teachings of experience. Page 648 of the article teaches:

"As Mr. Justice Stewart noted, concurring in *Rosenblatt*, the First Amendment is not the sole value in the field of defamation.

> 'The right of a man to protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.'

"In order to override this interest in protecting individuals from false defamation about their private lives, there must be a *reasonable relationship between what is discussed and how the individual affects the public.*" [Emphasis supplied]

Any public interest overtones involved in the specific area of the article dealing with the Petitioner were extremely minimal and the private marital difficulties of the Petitioner or any imaginary relationship between herself and one of her husband's detectives can hardly be said to be published as a benefit to public knowledge. Yet, because the Court of Appeals found these matters to be "germaine" to the general subject of eavesdropping, they were said to fall within the First Amendment protection of *New York Times Co.* v. *Sullivan.*

At page 654, the Yale Law Review article deals with this very type of logic:

> "It is, of course, possible to imagine arguments which would make any private trait relevant to any public role. . . The judgment of relevance, though, should be much more stringent. The Courts should demand that the defendant show a relationship on the basis of evidence and not on the basis of an artificially, albeit imaginatively, constructed connection. The injury to individuals and to the climate of public discussion is too great to permit personally defamatory

falsehood to go unpunished when no overriding public interest is served."

For the above stated reasons, this Court should accept jurisdiction of the cause and provide adequate guidelines dispelling the growing view that a purely private defamation is privileged as long as the publisher has included it within a general discussion of a public issue.

II

In Reviewing a Final Judgment Awarding Damages in a Libel Action Brought by a Private Citizen, to What Extent May a United States Court of Appeals Make a "De Novo" "Independent Constitutional Judgment"?

In *Rosenbloom* v. *Metromedia,* supra, the plurality opinion expressed the view that Federal Appellate Courts "cannot avoid making an independent constitutional judgment of the facts of the case", and that First Amendment questions "compel this Court's de novo review". Id. at page 54. Yet, as was commented upon by Justice Harlan's dissent, *New York Times Co.* v. *Sullivan* announced a rule of general application for review of lower Courts' decisions and the phraseology of the plurality's opinion in *Metromedia* lent itself to an interpretation that a case by case review of evidence by appellate courts was now being sanctioned.

In an attempt to construe the phraseology of *Metromedia,* the Court of Appeals was unable to reach agreement and it is submitted that this lack of agreement is merely illustrative of the confusion presently existing throughout the courts of this nation with regard to the scope of appellate review in First Amendment cases. Judge Ainsworth, after a researched interpretation of the word "de novo" found it to mean "anew; afresh; again;

from the beginning". (AP-A10) Basing his review upon such a definition, he overruled the District Court's findings on three separate issues of fact. Firstly, Judge Ainsworth held that although the reference to the Petitioner in the Life article involved her marital difficulties, said reference was "directly related" (AP-A9) and "germane" (AP-A11) to the article's central theme. The District Court had previously ruled that, "[T]he reference to Plaintiff [Petitioner] was merely 'illustrative' and it could have been deleted entirely without prejudice to the substance of the article". (A-932)

With regard to a second issue of fact, Judge Ainsworth held that, "The evidence is conclusive that later Geisler wound up on Plaintiff's side of the divorce controversy and was seen several times in her company". (AP-A13) The District Court held that the article "falsely libelled the Plaintiff [Petitioner]" (A-937) basing its finding of fact undoubtedly upon the Petitioner's testimony that the article was "not true" (A-168, 169) and that, in fact, Mr. Geisler had never even been in her house. (A-206) The District Court's finding was further buttressed by the fact that the pictures submitted into evidence by the Respondent which purported to show Mr. Geisler in the company of the Petitioner had the face of "Mr. Geisler" obliterated. (A-205) Furthermore, three of the Respondent's own witnesses refused to identify "Mr. Geisler" from the photographs. (A-449, 457, 507)

Finally, by virtue of an "independent de novo review", Judge Ainsworth held that:

> "Billings and Life's editorial staff had a right under the circumstances to rely on Chandler, who relied on Harwood. There is no evidence in the record which would justify the conclusion that Life knew its cap-

tion in the article relating to Mrs. Firestone was untrue or that the editorial staff entertained serious doubts about its truthfulness sufficient to amount to recklessness." (AP-A17)

The District Court had found that:

> "Billings formulated the caption based largely on a statement of a man who, to his knowledge, had a 'paranoiac hatred' of the plaintiff. Billings and others on the defendant's editorial staff had no other information and sought none, and they necessarily had a high degree of awareness of the probable falsity of the statement. The conclusion is inescapable that he and others who worked on the caption had serious doubts as to the truth of the article in its published form. The formulation of the statement, 'She in turn got one of Harwood's assistants to sell out. . .', was done for the purpose of adding spice and sensationalism and with complete disregard for the interests of the persons affected." (A-936)

Judge Bell thoroughly agreed with the District Court's finding of fact on this issue (AP-A22-A23) and, as did Judge Godbold, took issue with Judge Ainsworth's use of the phrase "independent de novo review" and the "new procedure" announced by Judge Ainsworth by which review of the trial proceedings was conducted by him. (AP-A22-A25)

It is evident from Judge Ainsworth's opinion that in overruling the District Court's findings on three separate issues of fact, he engaged in a process of weighing the credibility of witnesses and rejecting and accepting testimony as a finder of fact. Clearly, in holding that Life entertained no serious doubts about the truthfulness of Chandler's reports and that Life had a right to rely upon Harwood, Judge Ainsworth simply excluded from consid-

eration the fact that Richard Billings knew the information came from a man with "a paranoid hatred" of the Petitioner and that Life's agent, David Chandler, knew that any rumor regarding the Petitioner and Carl Geisler had come to Harwood by an anonymous phone call in the middle of the night. (A-472, 487) This Court has held that under such factual circumstances, it is for the trier of fact to determine whether the article was published in good faith. The Court has specifically expressed the following view:

> "Professions of good faith will be unlikely to prove persuasive, for example, where a story fabricated by the defendant, is the product of his imagination, *or is based wholly on an unverified anonymous telephone call.* Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. *Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*" [Emphasis supplied] *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968)

In holding that under the identical set of facts hypothesized by this Court in *St. Amant* the District Court could not properly find recklessness, Judge Ainsworth's opinion has created a direct conflict with the principles announced by this Court and has demonstrated his belief that appellate courts in First Amendment cases are free to weigh the credibility of witnesses and reject and accept testimony as a second trier of fact.

The use of the term "de novo" for the first time by the plurality in *Metromedia* has given rise to three separate opinions in the Court of Appeals in the instant case. Both Judges Bell and Godbold registered disagreement

with "the new procedure announced by Judge Ainsworth". (AP-A22) Both of these Judges pointed out that their interpretation of the phraseology does not exclude a deference to lower Court findings or allow the appellate court to make credibility choices. Judge Ainsworth, however, never specifically expressed his view with regard to the extent of review he deemed permissible. Nevertheless, by his reversal of the District Court's findings of fact, he has clearly indicated his belief that it is permissible to reject as unbelievable uncontradicted evidence of recklessness which under the dicta of *St. Amant* should clearly sustain a finding in favor of the Petitioner.

The confusion and disagreement created in the Court of Appeals for the Fifth Circuit with regard to the use of the term "de novo" is but the tip of an iceberg. Throughout the nation, courts will undoubtedly be forced to interpret this phrase. Justice Harlan's dissent in *Metromedia*, supra at page 63, warned that a feasible interpretation of the plurality's opinion could lead to a scrutiny of every jury verdict and an abandonment of the procedures announced in *New York Times Co.* v. *Sullivan*. It is respectfully submitted that a second trial of the facts surrounding First Amendment litigation was not what was intended by the plurality in *Metromedia*. This Honorable Court should, therefore, accept jurisdiction of the cause and delineate the proper reach of the term "de novo".

III

By What Burden Must a Plaintiff in a Libel Action Involving First Amendment Privileges Prove the Falsity of the Published Statement—Must the Plaintiff Prove the Falsity of the Statement by a Preponderance of the Evidence or by "Clear and Convincing Proof Greater Than a Preponderance"?

The Court of Appeals, in reversing the final judgment entered in favor of the Petitioner, expressed the view that the First Amendment required a showing by the Petitioner not only of the falsity of the published statement, but a showing of that falsity by "clear and convincing proof". (AP-A19) While Judge Ainsworth did not expressly discuss this issue, he did find the record lacking in evidence sufficient to justify by his standards the District Court's finding of falsity and as discussed previously, overruled this finding of fact. Of the three members of the panel below, only Judge Bell discussed at length the burden of proving falsity by this newly created standard. He readily admitted that this Court has never expressly added the requirement of clear and convincing proof of falsity to First Amendment cases, but found such a standard implicit in the stated requirement of *New York Times Co.* v. *Sullivan.* (AP-A19, A20)

Neither *New York Times Co.* v. *Sullivan* nor any subsequent case ever hinted at such a limitation upon the right of recovery for defamation. The essence of the *New York Times* privilege is that citizens may not be punished for good faith statements about public issues. Note, The Scope of First Amendment Protection for Good Faith Defamation Error, supra at page 651. This being the philosophy behind *New York Times,* the burden placed upon individual plaintiffs of demonstrating that an article was published with reckless disregard for their rights by

clear and convincing proof is well reasoned. This is all that *New York Times* requires. Supra at pages 279, 280, 285, 286.

However, the Court of Appeals has without justification or precedent extended the *New York Times* doctrine and created a new requisite to recovery. There can be no basis for extending this heavy burden of proof to the issue of the falsity of the statement and, indeed, the thought of doing so has never even been hinted at by any member of this Court. To allow the opinion below to remain in force would be to sanction an unwarranted extension of the *New York Times Co.* v. *Sullivan* doctrine and allow the creation of precedent which materially alters the established law with regard to First Amendment rights. For this reason, it is respectfully submitted that the Court should accept jurisdiction of this cause and declare that only the element of recklessness or knowledge of falsity need be proved by clear and convincing evidence. Such is clearly the intent of the long line of cases from *New York Times Co.* v. *Sullivan* to *Rosenbloom* v. *Metromedia.*

CONCLUSION

For all reasons stated herein, Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1887

MARY ALICE FIRESTONE,
Plaintiff-Appellee-Cross Appellant,

versus

TIME, INC.,
Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(April 20, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

AINSWORTH, Circuit Judge: In this libel action against a publisher of a national magazine, we are called upon again to apply the principles of *New York Times Company v. Sullivan*[1] and its progeny, to determine if the constitutional guarantees of the First and Fourteenth Amendments confer immunity from claims for damages, under the facts and circumstances of the case.

Mary Alice Firestone filed this Florida diversity suit for compensatory and punitive damages based on alleged

1. 376 U. S. 254, 84 S. Ct. 710 (1964).

libel and invasion of privacy against Time, Inc., growing out of the publication of an article in Life Magazine, owned by defendant. The matter is before us for the second time. (See *Firestone v. Time, Inc.*, 5 Cir., 1969, 414 F. 2d 790, for our prior opinion.) When this case was first appealed, Mrs. Firestone's complaint had been dismissed by the District Court on motion to dismiss. However, we reversed and remanded for further disposition, since it did not appear to a certainty that plaintiff would be entitled to no relief under any set of facts which could be proved in support of her claim. Id., 414 F. 2d 790.[2] See also *Arthur H. Richland Company v. Harper*, 5 Cir., 1962, 302 F.2d 324, 325; *Shell v. Hensley*, 5 Cir., 1970, 430 F. 2d 819, 826; *Conley v. Gibson*, 355 U. S. 41, 45-46, 78 S. Ct. 99, 101-102 (1957).

The publication complained of appeared in Life Magazine on May 20, 1966, in a lengthy feature story about electronic eavesdropping. Highlighted on the cover of the magazine the article was entitled "THE BIG SNOOP," "Electronic Snooping Insidious Invasion of Privacy." The cover showed a young lady partially undraped with a tiny transmitter taped to her back where her dress in place would conceal it. On the first page of the article was a photograph of a "bugged martini" with a plastic olive containing a built-in sending device and toothpick antenna which it was said could transmit a cocktail party conversation 100 feet. The article referred to eavesdropping as a "multi-million dollar industry"; and said that bugging is "shockingly widespread" and "increasingly insidious." In ten full pages "LIFE reveals in detail this electronic assault on privacy . . . ." There are photographs and text

2. In our first opinion we concluded that "plaintiff's journey from *allegata* to *probata* may well be a hard one, but she is entitled to make the effort however illusory the destination may be in face of her contentions of innuendo." Id., 414 F. 2d at 791.

pertaining to all types of electronic eavesdropping devices and "bugs." On one page of the story a photograph is captioned "Divorce Spy." Pictured is Jack Harwood of Palm Beach, Florida, apparently the "divorce spy". Immediately beneath his photograph is another of Russell Firestone and his estranged wife Mary Alice Firestone, plaintiff in this case. The magazine's text concerning the photographs of Harwood and Russell and Mary Alice Firestone is the specific subject matter of this suit and reads as follows:

> "TWO-WAY SNOOP. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire man,' was hired by tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice to stop spying on each other."

The Firestones were then engaged in marital litigation in a Florida State Court. The record discloses that the Harwood assistant referred to and about which there is considerable testimony was one Carl Geisler.

The two-count amended complaint alleged that the Life Magazine article defamed plaintiff where it stated, "She in turn got one of Harwood's assistants to sell out and work for her . . . ."; that plaintiff has enjoyed an unblemished reputation but, as a result of the defamatory article, has been severely injured in her personal relations and has suffered severe damage to her reputation in the community; that defendant well knew that the employee

[Geisler] said to have sold out to work for plaintiff was a private investigator who was to become a witness in the divorce action and whose credibility was severely damaged by the publication; that the defamatory words were intended to convey the meaning that plaintiff would incite Harwood's employee to commit perjury in violation of Florida Statutes, FSA § 837.04,[3] thus accusing plaintiff of committing a felony; that plaintiff's position in the court where the marital litigation is pending has been irreparably damaged by the article; that the publication has invaded the privacy of plaintiff's personal affairs causing her to become subject to disgrace and humiliation; that her private activities and her private divorce litigation were not matters of public concern or interest; that the defamatory language in the publication was false, to the knowledge of defendant, and was made with reckless and utter disregard for its truth or falsity, and with malice toward plaintiff. Defendant denied the allegations of the complaint and averred that the publication complained of was true, consisted of reports on matters of public interest, was made in good faith, pursuant to its duty to inform the public; that the publication was made without malice in a national news magazine of general circulation and is privileged and protected by the First and Fourteenth Amendments of the Constitution of the United States.

The case was tried before the District Judge, sitting without a jury, and resulted in judgment in favor of plaintiff for $15,000 compensatory damages and $15,000 additional punitive damages. Both parties have appealed, defendant contending that suit should have been dismissed

3. Florida Statutes, FSA § 837.04 reads as follows:
"837.04 Inciting to commit perjury
"Whoever endeavors to incite or procure any other person to commit perjury, though no perjury is committed, shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year."

in its entirety and plaintiff asserting that the award of punitive damages was inadequate.

The District Judge in written findings of fact and conclusions of law reviewed Florida jurisprudence relative to actions for libel under the law of that state.[4] He held that when Life's article stated that plaintiff caused one of Harwood's assistants [Geisler] to sell out to her, it necessarily charged that she paid him to betray her husband in a marital dispute between them, and that she had caused him to transfer his allegiance and confidentially obtained knowledge to her—in fact, that she "bribed" Harwood's assistant; that the article was actionable per se and libelous. He further held that the article was not constitutionally protected under the doctrine of *New York Times Company v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710 (1964), because plaintiff was not of the class of persons referred to in that

4. The pertinent finding by the District Court reads as follows:

"4. Florida jurisprudence does maintain a general distinction between statements which are actionable per se and those which are actionable per quod. The only material difference, however, is that in the latter case special damages must be pleaded and proved while in the former, damages are conclusively presumed to result from the very nature of the defamatory statement.[2] Under Florida law, any written language published of a person which 'tends to degrade him, bring him into ill repute, to destroy the confidence of his neighbors in his integrity, or to cause other like injury to him is actionable per se.'[3]

"2. See 20 Fla. Jur., Libel and Slander, § 6 (1968); Firestone v. Time, Inc., 414 F. 2d 790, 791.

3. 20 Fla. Jur., Libel and Slander, § 22; Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579, 582 (5 Cir. 1967)."

decision nor a public character and "[h]er private affairs were not a matter of legitimate public concern."[5] However, the District Judge made alternative findings and conclusions to the effect that even if *New York Times* were applicable plaintiff had sustained the burden of proof and was entitled to recovery. He held that Life's editorial staff "necessarily had a high degree of awareness of the probable falsity of the statements" attributed to Harwood relative to a "sell out," and that the conclusion was "inescapable" that the complained of words "sell out" were written "with reckless and wanton disregard for the truth and necessarily with serious doubts as to the truth" thereof. In his view, plaintiff suffered personal and public humiliation and her reputation was injured. In summary, the Court held that defendant had "falsely libeled" plaintiff, thus entitling her to compensatory and punitive damages.[6] However, the

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5. The Trial Judge's finding (No. 9) reads as follows:

"9. The court has previously ruled, on defendant's motion for summary judgment, that the article insofar as it related to plaintiff was not constitutionally protected under the New York Times doctrine. The court adheres to that ruling. The plaintiff was not of that class of persons who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.' Her private affairs were not a matter of legitimate public concern. The court reiterates that the mere fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference."

6. The Trial Judge's finding (No. 21) held in pertinent part: "In summary, *the defendant has falsely libeled the plaintiff* for which she shall recover the sum of $15,000 as compensation for actual damages suffered." This is a finding that the Life article (insofar as it affected plaintiff) was false and untrue. Thus we differ with Time, Inc.'s Reply Brief which contends that the District Court did not even find the article to be false, though resolution of this issue is not critical to our decision herein, for reasons we have already explained.

Trial Court held that plaintiff had no action for invasion of privacy because she had given "limited consent" to publication.[7]

Our review of this case is written with the principles of the recent decision of the Supreme Court in *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 91 S. Ct. 1811 (1971), squarely before us. In *Metromedia*, the Supreme Court reached a new dimension under the First Amendment constitutional protection for freedom of speech and of the press. No longer did the constitutional guarantee apply only to suits of public figures or public officials but in a sweeping decision the plurality opinion of the Court (by Justice Brennan) extended "constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." Id., 403 U. S. at 44, 91 S. Ct. at 1820.

The holding in *Metromedia* was anticipated by this Circuit in several prior decisions beginning with *Time, Inc. v. McLaney*, 5 Cir., 1969, 406 F. 2d 565, cert. denied, 394 U. S. 921 (1962), where we held that "the constitutional

7. When the Trial Judge denied defendant's motion for summary judgment, in an order containing written reasons, he held:

"Defendant first contends that the article was constitutionally protected under the doctrine of New York Times Co. v. Sullivan, 376 U. S. 254 (1964) and the subsequent cases that have expanded those concepts. The court is of the opinion that the plaintiff is not a 'public figure' under those authorities. And, while the general subject of eavesdropping may be considered a 'matter of great public concern,' certainly the plaintiff's private marital difficulties, as referred to in the article, are not of that character. Thus, while the general subject matter of an article might be protected, it does not follow that every particular reference therein is similarly immunized. It should also be stated that the fact that a publisher sees fit to refer to a particular individual in print does not establish the 'public' character of the person or reference. The law in this area has not stretched so far as to allow the publisher to create its own defense to possible litigation."

privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 406 F. 2d at 573. Next, in *Bon Air Hotel, Inc. v. Time, Inc.*, 5 Cir., 1970, 426 F. 2d 858, we said, "This Court in Time, Inc. v. McLaney . . . noted that the New York Times actual malice standard is applicable to publications involving matters of great public interest." 426 F. 2d at 861. Then in *Time, Inc. v. Ragano*, 5 Cir., 1970, 427 F. 2d 219, we reaffirmed the applicability of the New York Times standard requiring actual malice where the alleged defamatory article concerned a matter of great public interest, a statement being made with actual malice if made "with knowledge that it was false or with reckless disregard of whether it was false or not." 427 F. 2d at 221; *New York Times Company v. Sullivan*, 376 U. S. at 280, 84 S. Ct. at 726. In *Dacey v. The Florida Bar, Inc.*, 5 Cir., 1970, 427 F. 2d 1292, we said again, "that the First Amendment privilege extends to discussions of specific individuals, not associated with any government, if those individuals are involved in matters of important public concern." 427 F. 2d at 1295.[8]

Thus, somewhat prior to *Metromedia*, the Fifth Circuit was already firmly on record, as the above decisions illustrate, as holding that the constitutional privilege in favor of a publisher extends to publications relating to specific individuals, whether public figures or not, if those individuals are involved in matters of "important public concern," or "of great public interest," or "of important public concern."

As now expressed by the Supreme Court in *Metromedia*, 403 U. S. at 44, 91 S. Ct. at 1820, "It is clear that

8. See also United Medical Laboratories Inc. v. Columbia Broadcasting System, Inc., 9 Cir., 1968, 404 F. 2d 706, cert. denied, 394 U. S. 921, 89 S. Ct. 1197 (1969).

there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest."

It cannot be doubted that electronic eavesdropping is a matter of general public concern. Apparently the Trial Judge thought so in this case.[9] We construe the briefs and arguments of the parties to concede as much. However, plaintiff contends that though the Life Magazine article on electronic eavesdropping may be an article on a subject of general public interest and concern, it does not confer an unlimited privilege on the magazine to discuss the private, personal and marital difficulties of plaintiff, and more particularly does not authorize the use of false and defamatory matter known to be false or with serious doubts as to its truthfulness.

In our view the complained of text of the Life Magazine article under the caption "TWO-WAY SNOOP" is directly related to the central theme of the story. It states that electronic eavesdropping is frequently employed in divorce suits. A photograph of Harwood, a person who apparently specializes in the use of such equipment, is likewise so related. Whether Life was justified in stating in the caption that plaintiff Mary Alice Firestone "got one of Harwood's assistants to sell out and work for her" must

9. See n. 3, supra.
See pertinent part of the District Court's findings (Finding No. 10) as follows:
"Thus, while the general subject of electronic eavesdropping might properly be considered a matter of public concern, the plaintiff's private marital difficulties as referred to in the article were not."

be measured against the New York Times standard of knowing or reckless falsehood. As a reviewing court, we "cannot avoid making an independent constitutional judgment" on the facts of the case. *Metromedia*, 403 U. S. at 54, 91 S. Ct. at 1825; *Jacobellis v. Ohio*, 378 U. S. 184, 190, 84 S. Ct. 1676, 1679 (1964).[10] "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review."[11] *Metromedia*, 403 U. S. at 54, 91 S. Ct. at 1825.[12] Though civil litigation is ordinarily decided by the preponderance of the evidence, that standard along with the reasonable man standard of liability are rejected by the Supreme Court as being inconsistent with the First Amendment. *Metromedia*, 403 U. S. at 50, 91 S. Ct. at 1823. A negligence standard "gives insufficient breathing space to First Amendment values," *Metromedia*, 403 U. S. at 52, 91 S. Ct. at 1824; "[a] negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Time, Inc. v. Hill*, 385 U. S. 374, 389, 87 S.

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10. In *Jacobellis*, a First Amendment case involving a conviction for possessing and exhibiting an obscene film, the Supreme Court speaks of the necessity for recognition of the Court's duty to apply rules of law "upon the basis of an independent review of the facts of each case." Id., 378 U. S. at 189, 84 S. Ct. at 1678. See also Pennekamp v. Florida, 328 U. S. 331, 335, 66 S. Ct. 1029, 1031 (1946); New York Times Company v. Sullivan, 376 U. S. 254, 285, 84 S. Ct. 710, 728-729 (1964); Beckley Newspapers Corp. v. Hanks, 389 U. S. 81, 83, 88 S. Ct. 197, 199 (1967); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U. S. 6, 11, 90 S. Ct. 1537, 1541 (1970).

11. *De novo* is defined as meaning "anew; afresh; again; from the beginning." Random House Dictionary of the English Language (1966 ed.). See also Black's Law Dictionary (4th ed. 1951).

12. See also Edwards v. South Carolina, 372 U. S. 229, 235, 83 S. Ct. 680, 683 (1963), in which the Court refers to its duty "to make an independent examination of the whole record," and Blackburn v. Alabama, 361 U. S. 199, 205 n. 5, 80 S. Ct. 274, 279 (1960), in which the Court said, "we cannot escape the responsibility of scrutinizing the record ourselves." Both cases were, of course, First Amendment cases.

Ct. 534, 543 (1967). ". . . our 'cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' *St. Amant v. Thompson*, 390 U. S., at 731, 88 S. Ct., at 1325." *Metromedia*, 403 U. S. at 56, 91 S. Ct. at 1826. In this libel action the judgment in favor of plaintiff, a private individual, against the publisher of a national magazine "relating to [her] involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not." *Metromedia*, 403 U. S. at 52, 91 S. Ct. at 1824.

We have already determined that the Life Magazine article was on a matter of general public interest and that the part of the text relating to the Firestone marital difficulties and electronic eavesdropping employed in connection with the divorce action were germane to the article's principal theme and subject matter.

In our own independent *de novo* review of the facts of this case and in our search for the clear and convincing proof in the record which is required to sustain a judgment for plaintiff, we have examined the evidence to determine whether the magazine article was published with knowledge that it was false or with reckless disregard of whether it was false or not. Having done so we reach an opposite conclusion from that of the District Court. Clear and convincing proof greater than a preponderance is simply not to be found in the record. We suspect, for reasons we shall point out, that the Trial Judge used a negligence standard (or failure to use reasonable care) in determining

that defendant was liable. Employing such a standard is obvious error when we consider the Supreme Court's recent decisions involving freedom of the press as guaranteed by the First Amendment. Likewise, it should be remembered that since our review of the facts of the case is *de novo*, we are not bound by the findings of the District Court. *Time, Inc. v. Pape*, 401 U. S. 279, 284, 91 S. Ct. 633, 636-637 (1971).[13] It is at once apparent that the scope of review in First Amendment libel cases is the broadest possible under the law. The Supreme Court has fashioned such broad review because our early history and expressions by our founding fathers, such as Madison, indicate that liberty of the press is considered "sacred" in America, and that our free society is dependent for its survival upon a vigorous free press.[14] The immunity conferred by the First Amendment in favor of a publication is therefore designed

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13. In Time, Inc. v. Pape, supra, the Supreme Court said:
"The only question before us, therefore, is whether the Court of Appeals correctly applied this constitutional rule to the facts of this case in reversing the directed verdict for the defendant. Inquiries of this kind are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution *this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded.*' Niemotko v. Maryland, 340 U. S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267. Cf. Napue v. Illinois, 360 U. S. 264, 271-272, 79 S. Ct. 1173, 1178-1179, 3 L. Ed. 2d 1217. And in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff. *New York Times*, supra, 376 U. S., at 284-285, 84 S. Ct., at 728; Beckley Newspapers Corp. v. Hanks, 389 U. S. 81, 83, 88 S. Ct. 197, 199, 19 L. Ed. 2d 248; St. Amant v. Thompson, 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262; Greenbelt Co-op Pub. Ass'n v. Bresler, 398 U. S. 6, 11, 90 S. Ct. 1537, 1540, 26 L. Ed. 2d 6."
(Emphasis by the Court.) *Id.*, 401 U.S. at 284, 91 S. Ct. at 636, 637.

14. *Metromedia*, 403 U. S. at 51, 91 S. Ct. at 1823.

more for the protection of the public generally than it is for the publisher himself.

The facts show that when Life began assembling the materials for this article it sent David Chandler to Florida to make an investigation as a reporter into the use of electronic eavesdropping devices in connection with sensational divorce actions in that area. Chandler had originally been employed by Life in 1964 and had been working for the magazine for nearly four years at the time. His immediate superior, Richard Billings, considered him a reliable reporter based on his past experience with him in work he had done for the magazine. It was Chandler who provided the facts for Billings and Life's editorial staff which formed the basis of the caption in the article pertaining to plaintiff getting one of Harwood's assistants to "sell out" and work for her. The assistant referred to was Carl Geisler. It is undisputed that Geisler worked for Harwood in his private detective business at a time when Harwood was employed by plaintiff's husband Russell Firestone in surveillance of Mrs. Firestone, plaintiff herein. The evidence is conclusive that later Geisler wound up on plaintiff's side of the divorce controversy and was seen several times in her company. Chandler secured his information about the controversial "sell out" from Harwood and at the trial of this case Harwood testified that he had indeed told Chandler that Geisler, a former private investigator employed by him, was then working on the other side but Harwood said that he had told Chandler the information had come to him from anonymous phone calls.[15] He

15. Pertinent portions of Harwood's testimony at the trial of this case read as follows:

"BY MR. FRATES:

"Q. Mr. Harwood, let me show you your deposition. Do you recall the deposition when Mr. Stewart and I came up and Mr. Lindsey, this gentleman here, took your deposition—

testified that he told Chandler that he had suspicions that while Geisler was still employed by him he was friendly with Mrs. Firestone's side in the divorce contro-

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"A. Yes, sir.
"Q. —over in a court reporter's office—
"A. Yes, sir.
"Q. —and Mr. Stewart, this gentleman back here, interrogated you and had some conversations. Have you had an opportunity to read this deposition?
"A. I don't believe I have ever read it.
"Q. I ask you if this refreshes your recollection here, sir.
"MR. FARISH: What page, Counsel, so I can check it?
"MR. FRATES: Page 7.
"BY MR. FRATES:
"Q. 'And when you discussed—' I am reading from Line 9—*'when you discussed the Firestone case with Mr. Chandler did you discuss with him and did you advise Mr. Chandler and tell him that Geisler, after having worked for you, went over and worked for Mrs. Firestone?'*
"And your answer was 'Yes.'.
"Do you recall that?
"MR. FARISH: Your Honor, I object to that. Your Honor, has already ruled that is improper. He is trying to impeach his own witness.
"MR. FRATES: Now, sir, your Honor said that I could ask this one.
"MR. FARISH: He is trying to impeach his own witness, sir. He offered this man's testimony.
"THE COURT: I will sustain the objection. I let him read that so he could refresh his recollection—this man's memory what this man had said on a previous occasion.
"BY MR. FRATES:
"Q. Let me read the whole thing.
'Yes.' then 'On the other side of the case?'
And your answer 'Yes.'
"Q. And did you also tell him that it was your opinion that Geisler had sold out in going over to the other side?
"And your answer under oath was 'Yes.'
"Do you recall making those statements, Mr. Harwood—
"MR. FARISH: Object.
"MR. FRATES: Excuse me.—to Mr. David Chandler:
"MR. FARISH: To which I object, your Honor. He is attempting to impeach his own witness.
"THE COURT: I will overrule the objection for this particular moment, since it is—
"THE WITNESS: *Yes, sir, I remember making that on the deposition.*
"BY MR. FRATES:
"Q. And are those correct statements that you made under oath?
"A. Reasonably so, yes."
(Emphasis is supplied by the Court.)

versy. Harwood added that Geisler "had been acting very strange."

The information concerning the "sell out" was telegraphed by Chandler to Life Magazine at New York, attention of Billings.[16]

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16. Pertinent extracts from Chandler's dispatch to Life follow:

"HARWOOD HAS BEEN SHADOWING MARY ALICE SINCE JUST BEFORE FEBRUARY, 1964. SINCE THAT TIME, HE HAS DEVELOPED A PARANOIAC HATRED OF HER. HE CALLS HER A NYMPHOMANIAC PIG. SHE HATES HIM, TOO, BUT IS LESS DESCRIPTIVE ABOUT IT. *SHE WOOED ONE OF HARWOOD'S TOP INVESTIGATORS, CARL GEISLER, TO WORK IN HER INTERESTS. GEISLER AND MARY ALICE'S BROTHER, CHARLES TURNER, COMBINED AS HER AND HER THREE-YEAR-OLD CHILD,* MARK, *BODYGUARD.* (A. 73)

* * * *

"MRS. FIRESTONE CONTINUES: 'I MADE PHONE RESERVATIONS FOR A PLANE TO FREEPORT (BERMUDAS) AND TOLD NO ONE ELSE I WAS GOING. HARWOOD'S DETECTIVES WERE ON THE PLANE. THEY TOOK PICTURES OF ME WHEN I GOT OFF IN FREEPORT.

"ANOTHER TIME, I HAD GONE HOME ONE NIGHT AND GONE TO SLEEP AND ALL OF A SUDDEN HEARD THIS TERRIBLE NOISE, MORE THAN A NOISE, LIKE HORRIBLE. IT WAS THREE DETECTIVES KICKING THE DOORS DOWN. (*ONE OF THEM WAS CARL GEISLER ANOTHER WAS HARWOOD*). I SCREAMED AND CRIED. FLASHBULBS WENT OFF AND THERE I WAS STANDING WITH MY BABY AND THE NURSE. THE NEXT DAY I ASKED HER HUSBAND ABOUT IT AND HE SAID HE KNEW NOTHING ABOUT IT.

"THE DETECTIVES TOLD ME THEY WERE AFTER BURGLARS. THEY TORE OUT MY PHONE AND TOOK MY CAR KEYS AND SAID THE POLICE WOULD COME SHORTLY. THEN THEY LEFT. I THOUGHT THERE REALLY WERE BURGLARS THEY WERE AFTER. I WANTED TILL DAYLIGHT, THEN I WALKED TO A NEIGHBOR'S AND PHONED THE POLICE.

"(*HARWOOD VERIFIES THIS STORY AND SAYS IT IS ON THIS OCCASION THAT HE FIRST KNEW CARL GEISLER HAD SOLD HIM OUT TO MARY ALICE.*)

The District Judge in analyzing the testimony found that Billings and others on Life's editorial staff "had no other information [than Chandler's] and sought none, and they necessarily had a high degree of awareness of the probable falsity of the statement." The District Judge's opinion tends to show that he employed a negligence standard in assessing the evidence against defendant, which is an erroneous and improper standard, as we have previously

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"HIS STORY. 'I HAD LEFT GEISLER TO WATCH THE HOUSE. IT WAS RUSSELL'S HOUSE AND WE HAD PERMISSION TO ENTER. *GEISLER RADIOS ME THAT MARY ALICE AND SOME GUY HAD GONE TO THE HOUSE AND IT'S TIME TO MAKE THE BUST.* WE GET TO THE HOUSE AND GEISLER POINTS OUT THE ROOM HE SAYS MARY ALICE AND THE GUY ARE DRINKING IN. WE BUST IN THE DOOR. THERE'S MARY ALICE ALONE WITH THE BABY AND NURSE. WE LOOK THROUGH THE HOUSE. NOBODY. WE BUST RIGHT BACK OUT. (A. 76, 77)

* * * *

"MARY ALICE, GEISLER AND HARWOOD RELATE THAT FOR THE NEXT MONTH THE CHILD WAS KEPT UNDER ARMED DETECTIVE GUARD AT RUSSELL'S RENTED HOUSE. MARY ALICE, ALL AGREE, VISITED THE BABY DAILY, CRYING AND BEGGING TO BE GIVEN HIM. SHE WOULD USE THE PHONE AT THE RENTED HOUSE AND HARWOOD BUGGED THAT PHONE. *GEISLER FOUND THE RECORDER AND MADE HIS FINAL SPLIT WITH HARWOOD.* MARY ALICE GOT THE BABY BACK. (A. 77, 78)

* * * *

"LAST NEW YEAR'S EVE, HER BROTHER CHARLES TURNER NOTICES AN UNUSUAL AMOUNT OF WIRES IN THE GARAGE ADJOINING THE HOUSE. HE AND MARY ALICE TELEPHONE CARL *WHO INSPECTS AND FINDS THE TAP.*

" 'THE BATTERIES WERE LOW,' *SAYS CARL,* 'SO I HAD MARY ALICE TELEPHONE SEVERAL PEOPLE SAYING SHE WAS GOING OUT THAT NIGHT. I FIGURED THE TAPPER WOULD USE THE OPPORTUNITY TO REPLACE THE BATTERIES. *CHARLES AND GEISLER HID IN THE GARAGE.* SURE ENOUGH, IN ABOUT HALF AN HOUR THIS GUY COMES CREEPING INTO THE GARAGE. HE'S GOT HIS SHOES IN HIS HANDS. I JUMP HIM AND CALL THE POLICE. MAN, WE GOT HIM. WE GOT THE WIRETAP EQUIPMENT AND WE GOT THE GUY IN THE GARAGE TRYING TO CHANGE THE BATTERIES. WITH WITNESSES.' " (A. 78, 79)
(Emphasis by the Court.)

indicated. The Trial Judge's statement that "[t]he conclusion is inescapable that [Billings] and others who worked on the caption had serious doubts as to the truth of the article in its published form" is at odds with the evidence which we have scrutinized to find the clear and convincing proof of knowing or reckless falsehood requisite in this case.[17] The circumstance of Geisler working for Harwood who was employed by Mr. Firestone, and later working for Mrs. Firestone, plaintiff herein, in the same marital litigation has not been explained by plaintiff or her witnesses. Whether or not she procured the "sell out" or Geisler changed sides for some other reason is a matter of conjecture, but a resolution of that question is not necessary to our decision here.

Billings and Life's editorial staff had a right under the circumstances to rely on Chandler, who relied on Harwood. There is no evidence in the record which would justify the conclusion that Life knew its caption in the article relating to Mrs. Firestone was untrue or that the editorial staff entertained serious doubts about its truthfulness sufficient to amount to recklessness. Though the Trial Judge so found he did not support his finding with evidentiary facts. We have determined in our own independent *de novo* review of this case that the District Judge decided the case by employing erroneous legal standards and his conclusions are not supported by the record. Under *New York Times* and its progeny, especially *Metromedia*,

17. By coincidence the same finding was made by the District Court in *Metromedia* and the Supreme Court held that "there is no evidence in the record to support a conclusion that respondent 'in fact entertained serious doubts as to the truth' of its reports." Id., 403 U. S. at 57, 91 S. Ct. at 1826.

and the prior decisions of this Court, plaintiff cannot recover under the circumstances presented here.

REVERSED.

BELL, Circuit Judge, SPECIALLY CONCURRING:

I concur in the result reached by Judge Ainsworth that the evidence is insufficient to warrant recovery by plaintiff in this case, and thus in the reversal. My reasons for reaching this result differ, however, in substantial measure from those of Judge Ainsworth. Moreover, I reach the result without the use of the procedural euphuism—a de novo review in the appellate court.

I.

In *New York Times v. Sullivan*, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, the Supreme Court fashioned a procedural technique under the aegis of the First Amendment to insulate the communications industry from state libel laws. That case involved a libel action brought by a public official against a newspaper. The rule was announced that in such an action, the complainant must meet a standard of proof of convincing clarity that a defamatory falsehood alleged as libelous was uttered with ". . . knowledge that it was false or with reckless disregard of whether it was false or not . . ." 376 U.S. at 280.

This rule reached its full scope in *Rosenbloom v. Metromedia*, 1971, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296, when it was extended to place the same burden on any citizen if the utterance involved is related to an issue of public or general concern. 403 U.S. at 44.

Also in *Garrison v. Louisiana*, 1964, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125, and again in *Rosenblatt v. Baer*, 1966, 383 U.S. 75, 84, 86 S.Ct. 669, 15 L.Ed.2d 597,

both public official cases, the court stated that the holding in *New York Times v. Sullivan* also establishes that the burden is on the plaintiff in such a case to establish the falsity of the utterance.[1]

safe freedom of the press.

Thus, the present rule is that the burden of the plaintiff in a libel action against the news media arising out of a defamatory publication, where a First Amendment defense is asserted, is (a) to establish by clear and convincing proof[2] that (b) the statement was false and (c), that it

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1. This is a departure from the rule that a defamation is presumed to be false with the burden being cast upon the defendant to plead and prove truth. Prosser, Law of Torts, p. 798 (4 Ed., 1971). It is also a departure from the Florida rule. See *Miami Herald Publishing Company v. Brautigam*, 1961, 127 So.2d 718.

The language used in *Garrison* was as follows:

> "We held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." 397 U.S. at p. 75.

This can be read as permitting the presumption of falsity from a defamatory statement where the issue is reckless disregard as distinguished from an allegation of actual knowledge of falsity. Indeed, it is difficult to imagine how actual knowledge of falsity could be established without proof of falsity, thus explaining the use of this language in *Garrison*. However, it may be argued that where plaintiff relies on proof of reckless disregard for truth, no proof of actual falsity is necessarily implicit in plaintiff's case. Stated differently, in such a case, proof of falsity is not a logical prerequisite.

The view that Garrison does not intend to abrogate state law by requiring a plaintiff to prove falsity is reinforced by looking to the origin of the quote in *New York Times v. Sullivan*, supra, at 279-80. The court does not there or in later cases appear to deal with the question of proving falsity, but rather with what degree of awareness and proof thereof will excuse the publication of a falsity. Absent specific derogation of the state law should be preserved except where in direct conflict with the rule fashioned by the Supreme Court.

However, this narrow reading of the Garrison language should be rejected. Such would hardly comport with the other broad safeguards created in *New York Times* and its progeny to vouch-

2. The language "convincing clarity" in *New York Times*, 376 U.S. at 285-86, was transposed into "clear and convincing" in *Metromedia*, 403 U.S. at 30.

was published with the knowledge that it was false or with reckless disregard of whether it was false or not.

The Supreme Court has not expressly added the requirement of clear and convincing proof of falsity to the plaintiff's burden of proof. As stated, the burden of showing falsity has been imposed upon the plaintiff in First Amendment cases. *Garrison*, supra; *Rosenblatt*, supra. Such a standard of proof seems implicit however, in the stated requirement in *New York Times* that plaintiff has the burden of showing by clear and convincing proof that publication was with knowledge of falsity or with reckless disregard as to falsity *vel non*. I conclude for the same constitutional reasons giving rise to this stringent proof requirement that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance.

Given the rule of *New York Times* with the gloss of *Garrison* and *Rosenblatt*, supra, as extended in *Metromedia*, the questions become first, whether plaintiff sustained her burden of establishing by clear and convincing proof that the published statement in issue was false, and second, whether defendant Time, Inc., acting through its Life Magazine employees, printed the statement with knowledge that it was false or with reckless disregard of whether it was false or not.

Plaintiff, a hapless private citizen, involved in a divorce proceeding with attendant wiretapping activity at the behest of her husband and his private detective-minion, was partially the subject of a Life article on wiretapping where she was charged with getting one of her husband's private detectives "to sell out and work for her." This statement

was alleged to be false and defamatory. The article in pertinent part is printed in the margin.[3]

In publishing the article, Life relied entirely on the text of a long telegram from a stringer correspondent, Chandler. The pertinent part of the text is contained in footnote 16 of Judge Ainsworth's opinion. What appears from the text is that Mrs. Firestone "wooed one of Harwood's top investigators, Carl Geisler, to work in her interests." Chandler then quoted Mrs. Firestone as recounting an invasion by Harwood, Geisler and another private detective into her bedroom, through the medium of kicking the door down. The persons in the bedroom at the time were Mrs. Firestone, her baby and the baby's nurse. Harwood expected to find a man in the house with Mrs. Firestone at the time, and the raid was on the signal of Harwood's lookout, Geisler. Chandler stated in the telegram to Life that Harwood said to him that it was "on this occasion that he first knew that Carl Geisler had sold him out" to Mrs. Firestone.

Life's conduct must be justified on the text of the telegram. The language of the telegram was escalated to some extent in the article but probably not to a prohibited degree. The rub comes from other facts contained in the telegram. There was much to put Life on notice to move cautiously. The description of Harwood's work style was revolting to the point that one might question his credibility. In addition, Chandler drew the conclusion

3. "TWO-WAY SNOOP. In Florida, where electronic eavesdropping is frequently employed in divorce suits, private eyes like Jack Harwood of Palm Beach, shown above with some of his gear, do a thriving business. Harwood, who boasts, 'I'm a fantastic wire man,' was hired by the tire heir Russell Firestone to keep tabs on his estranged wife, Mary Alice. She in turn got one of Harwood's assistants to sell out and work for her and, says Harwood, 'He plays just as rough with the bugs as I do.' A court recently ordered Russell and Mary Alice to stop spying on each other."

that Harwood had "developed a paranoiac hatred" of Mrs. Firestone. Life made no check with anyone other than Chandler before publishing the statement.

Nevertheless, I do not find it necessary to reach the question whether a fact issue is presented as to reckless disregard on the part of Life. I get no further than the preliminary question whether the proof is clear and convincing that the statement was false. The record will be searched in vain for clear and convincing proof that Mrs. Firestone did not arrange in some manner for the services of Geisler, a former private detective for Mr. Firestone. There is no express denial from Mrs. Firestone of the fact. There is unrefuted evidence that Geisler was working with and under Harwood for Mr. Firestone. There is substantial evidence that he was later in the service of Mrs. Firestone on some basis.

The district court made no subsidiary findings of fact on falsity. At most, there was an assumption of falsity. As the court stated in *New York Times v. Sullivan*, 376 U.S. at 284-85, where the case might have been retried if remanded or reversed, ". . . we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for [plaintiff]."

The record as a whole, including all subsidiary facts that might lend support to the allegation of falsity, is bereft of clear and convincing proof of falsity. There the matter ends.

II

I also wish to register disagreement with the new procedure announced by Judge Ainsworth of deciding First Amendment cases *de novo*. I do not take the use of the

term "*de novo*" for the first time in the plurality opinion in *Metromedia* (three justices), 403 U.S. at 54, to establish a new and different standard of review in First Amendment cases from that previously announced by the Supreme Court.

The term "*de novo*" is not one to be used indiscriminately, given its other uses in procedural law. One ordinarily thinks of a trial *de novo* when a case is appealed from one trial tribunal to another. Perhaps the most familiar use of the term in the federal courts was in the old admiralty practice where appellate courts reviewed admiralty trials *de novo* and could take additional proof where indicated. Judge Godbold in *Caradelis v. Refinera Panama, S.A.*, 5 Cir., 1967, 384 F.2d 589, 592-93, discussed this former practice and the abolition of it by the Supreme Court in *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, which applied the clearly erroneous principle of Rule 52, Federal Rules of Civil Procedure, to admiralty cases.

When considering the state of records to be reviewed in appellate courts, state and federal, jury and non-jury trials, it becomes apparent that the use of the term "*de novo*" in *Metromedia* was one of emphasis—to the end that reviewing courts must carefully consider the facts pertaining to constitutional questions. We do this by making our own careful examination of the record, with particular scrutiny of the underlying or subsidiary facts—to see if the factual conclusions meet the high standard set in *New York Times*, supra, of finding clear and convincing proof. This is the teaching of *New York Times, Metromedia, Time v. Pape*, 1971, 401 U.S. 279, 284, 91 S.Ct. 633, 28 L.Ed.2d 45; *Edwards v. South Carolina*, 1963, 372 U.S. 229, 235, 83 S.Ct. 680, 9 L.Ed.2d 697; *Blackburn v. Alabama*, 1960, 361 U.S. 199, 205 n.5, 80 S.Ct. 274, 4 L.Ed.2d

242. This leaves the law as a workable institution. A *de novo* review in the traditional sense would reduce the trial courts to a level below that of a master; they would simply be recorders of the evidence. There would be no one to make credibility choices. We are not told what would be done with jury verdicts nor with the Seventh Amendment. This is not my reading of the plurality opinion in *Metromedia*.

I hasten to add that Judge Ainsworth has only used the term "*de novo*" in his review of the record. I neither perceive nor suggest that he would or has ignored credibility findings or the clearly erroneous rule as it applies to underlying or subsidiary facts as distinguished from conclusions of fact.

GODBOLD, Circuit Judge, SPECIALLY CONCURRING:

I concur in the result reached by Judge Ainsworth, but I am not able to join in all of what he has said. It seems to me that some caveats are necessary.

I agree that the constitutional guaranty now extends to discussion and communication involving "an issue of public or general concern." However, the reach of that term was not an issue in *Metromedia*, which left the delineation thereof to future cases, *Rosenbloom v. Metromedia*, 403 U.S. 29 at 44-45, 29 L.Ed. 2d 296, at 312 (1971). The plurality opinion in that case recognized that there are areas of a person's activities that fall outside the scope of public or general interest. While I accept that the publication in this case was within the *Metromedia* phraseology, it seems to me important to note that the publisher may not, by mere artful characterization, force into the ambit of the phrase activities otherwise outside of its scope.

Secondly, Judge Ainsworth's opinion chooses as a standard of review "independent de novo review" without

definition of what that illusory term means. The phrase alone does not adequately answer the question of the extent to which, in making an independent examination of the record, we give effect or deference to lower court findings. However, the cases relied upon by Justice Brennan, 403 U.S. at 54, 29 L.Ed. 2d at 318, flesh out the term. They seem to me to compel rejection of any implication that review is to exclude a residual deference to lower court findings. *Edwards v. South Carolina*, 372 U.S. 229, 235, 9 L.Ed. 2d 697, 701-02 (1963), refers to the "duty . . . to make an independent examination of the whole record" [citing footnote 5 of *Blackburn v. Alabama*, 361 U.S. 199, 205, 4 L.Ed. 2d 242, 247 (1960)], but in the sentences immediately preceding, 372 U.S. at 235, 9 L.Ed. 2d at 701, *Edwards* recognized that the Supreme Court "may accept . . . as binding" the decision of the state court that the petitioners' conduct constituted breach of the peace under state law.

Footnote 5 of *Blackburn* said this: "It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves." The footnote supports the statement in text that the Court has accorded to the trial judge's decision "all of the deference . . . which is compatible with our duty to determine constitutional questions." 361 U.S. at 205, 4 L.Ed. 2d at 247. Cited in footnote 5 is *Pierre v. Louisiana*, 306 U.S. 354, 83 L.Ed. 757 (1939), which held that "the conclusions reached by the Supreme Court of Louisiana are entitled to great respect" but that the Court has a duty to make independent inquiry and determination of the disputed facts.

These cases make clear that the newly-employed phrase "de novo" does not mean that the appellate court's duty to make an independent examination of the record is to be pursued in the manner of a plenary new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1887

D. C. Docket No. 66-907
MARY ALICE FIRESTONE,
Plaintiff-Appellee-Cross Appellant,

versus

TIME, INC.,
Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiff-appellee-cross appellant pay to defendant-appellant-cross appellee the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1972

BELL, Circuit Judge, SPECIALLY CONCURRING:

GODBOLD, Circuit Judge, SPECIALLY CONCURRING:

Issued as Mandate:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari and Appendix has been furnished Frates, Floyd, Pearson & Stewart, Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, by mail, this 16th day of June, A. D. 1972.

JOS. D. FARISH, JR.
Attorney